

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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Federal Communications Commission  
Office of Secretary

In the Matter of )

Definition of Markets for Purposes of the )  
Cable Television Mandatory Television )  
Broadcast Signal Carriage Rules )

CS Docket No. 95-178

Implementation of Section 301(d) of the )  
Telecommunications Act of 1996 )

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Market Determinations )

To: The Commission

**REPLY COMMENTS OF**  
**WRNN-TV ASSOCIATES LIMITED PARTNERSHIP**

WRNN-TV Associates Limited Partnership, the licensee of WRNN-TV, Kingston, New York ("WRNN"), by counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.45 (1995), hereby submits its reply to the comments filed on the Further Notice of Proposed Rulemaking ("NPRM") in the above-referenced docket.

**BACKGROUND**

In its comments, WRNN stressed the need for the Commission to amend its rules so that, in determining modifications of markets, stations that otherwise qualify for must-carry and pledge to provide concrete amounts of public interest programming receive added preference for full market-wide carriage, irrespective of any other factors in a market modification analysis.<sup>1/</sup> WRNN explained that this proposed modification to Section 76.59

<sup>1/</sup> Comments of WRNN-TV Associates Limited Partnership ("WRNN Comments"), CS Docket No. 95-178 (October 31, 1996).

of the Commission's rules is necessary in order for the market modification process to once again promote localism by providing incentives for stations to serve market communities with targeted local programming. This, WRNN illustrated, will foster the widespread dissemination of information from diverse sources and encourage fair competition, while preserving the benefits of free, over-the-air local broadcast television -- the very policies which compelled Congress to enact must-carry.

Relatedly, WRNN's comments chronicled the station's own must-carry success story.<sup>2/</sup> WRNN showed how must-carry (along with the related change in copyright laws allowing for copyright-free carriage throughout its market -- the New York ADI) has allowed WRNN to pursue market wide carriage across New York, New Jersey and Connecticut, such that WRNN serves viewers across the tri-state area with valuable regional news, and other programming simply unavailable from any other broadcasting source. WRNN has come to embody the exact type of station Congress envisioned in enacting must-carry. By providing extensive news and public affairs programming to communities across its market, WRNN has tangibly and dramatically promoted Congress' goal of localism.

WRNN also explained, however, that the Commission's recent spate of market modification decisions have not only failed to explicitly reward broadcasters' commitments to local interest programming, but have severely curtailed stations' ability to serve their entire markets. In particular, in granting the cable operators' deletion petitions, the Commission has eviscerated carriage rights by relying on arbitrary factors like Grade B contours and linear distance of the stations to the communities, while ignoring stations' local programming

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<sup>2/</sup> WRNN Comments at 2-4.

commitments to the communities. The Commission has done so despite Congress' clear intentions to the contrary in passing the 1992 Cable Act to provide for market-wide carriage in order to further the notion of localism. Consequently, WRNN commented that its revision to the must-carry rules will best refocus the Commission's decision-makers on the ideal of localism to once again render market modification proceedings as a vehicle to serve Congress' goals. Otherwise, cable operators will continue to frustrate smaller, independent stations' carriage rights, threatening these stations' competitive viability by refusing the stations a means to meaningfully compete with the operators for viewers and advertising revenue, while robbing viewers of much-needed programming sources.

### DISCUSSION

In these Reply Comments, WRNN limits its discussion to replying to those commenters discussing WRNN's proposed reform to the Commission's rules.<sup>3/</sup> In its

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<sup>3/</sup> As to Time Warner Cable's unrelated contention that the Commission should grant cable operators' requests for stays of Bureau decisions ordering carriage of a station where the operator has already lost a Bureau market modification decision (Comments of Time Warner Cable at 7), WRNN responds as follows. Contrary to Time Warner's assertions, viewer disruption, unnecessary costs and loss of good will do not arise from the cable operator adding the station after the operator has lost its modification proceeding. In denying the deletion petition, the Commission has already made a threshold determination in denying the market modification petition that the station serves viewers in those communities and that carriage of the station will promote localism. Thus, carriage is mandated to further the interests of the viewing public, rendering any costs essential, not unnecessary, in order to serve the public.

To do as Time Warner suggests would allow operators to use the appeal process to frustrate carriage when the Bureau has already decided that the station provides local service to the cable communities. Clearly, such a thinly-veiled attempt by cable operators to evade their mandatory carriage obligations should not be countenanced under the guise of consumer disruption or higher costs. Viewers should not be held

(continued...)

comments, the National Association of Broadcasters ("NAB") opposed WRNN's proposal, claiming that in deciding market modification cases, no statutory basis exists for preferences to be granted by the Commission to stations pledging to provide quantitative amounts of public interest programming. NAB also charged that WRNN's plan would be subject to a context-based constitutional challenge.<sup>4/</sup>

First, no doubt can exist regarding the statutory justification for WRNN's modification. Congress enumerated four factors for the Commission to evaluate in deciding market modification petitions in order to advance localism.<sup>5/</sup> Of all criteria considered in this analysis, the unique value of local programming best allows a broadcaster to serve the viewers in its market, directly furthering the interests of local service. The Commission's recent ADI modifications, which have ignored Congressional intent by relying almost exclusively upon Grade B contours and mileage, have created the need for WRNN's proposal in order to ensure that the Commission's future market modification decisions will no longer eschew the policies underlying the statute.

In fact, Paxson Communications Corporation ("Paxson") similarly criticized the same degeneration of the must-carry policies and the market modification mechanism, into a de-facto Grade B/mileage based test having little, if anything, to do with local service. Paxson's comments warned that the logical extension of the Bureau's market modifications

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<sup>3/</sup>(...continued)

hostage while cable operators pursue any and all avenues of appeal to evade their carriage duties.

<sup>4/</sup> NAB Comments at n.10.

<sup>5/</sup> 47 U.S.C. § 534(h)(1)(C)(ii).

decisions is to substitute Grade B or mileage based standards -- which Congress explicitly rejected in passing the Cable Act -- for the proper localism analysis. The result is to take a "fine-tuning device" (i.e., market modifications) and ". . . effectively write the must-carry provisions out of the statute."<sup>6/</sup>

Further, Paxson correctly underscored the need for adoption of WRNN's proposal because the Bureau's current interpretation of the market modification procedures set forth in the statute, evidenced by its market modification decisions, "perpetuates the dominance of larger established stations and cable operators at the expense of the smaller stations Congress intended to aid, and the competition and program diversity it intended to foster."<sup>7/</sup>

Implementation of WRNN's modification to the rules, on the other hand, will encourage an increase in locally produced public interest programming commitments from broadcasters, and further the goals of programming diversity -- the very goals which underlie the Cable Act:

By establishing a presumption in favor of those stations willing to go on record with a commitment to present locally produced, public interest programming, the Commission could indeed 'better effectuate' the purposes of Section 614 of the 1992 Cable Act by ensuring cable carriage of local stations so that such stations can support the origination of local programming and compete with established stations and cable operators in a diverse television marketplace.<sup>8/</sup>

Thus, enactment of WRNN's proposal is mandated by the Bureau's persistent misapplication of the statute in its market modification decisions. For NAB to question the statutory basis of the proposal defies the clear language of the statute and the inescapable

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<sup>6/</sup> Paxson Comments at 21.

<sup>7/</sup> Id. at 24.

<sup>8/</sup> Id. at 30, 33.

mandate of Congress' intent, while ignoring the blatant, deleterious effects on stations' carriage rights brought about by the Commission's decisions.

Second, WRNN's proposal should not properly raise any constitutional concerns. In its comments WRNN already explained<sup>9/</sup> that it does not advocate having the Commission dictate to broadcasters the specific content of the programming stations air to receive a presumption of carriage. Rather, WRNN suggests the Commission should broadly encourage public interest programming, while leaving it up to the station itself to determine the particular form in which the programming is aired (e.g., news, children's, public affairs).

In Turner Broadcasting v. FCC,<sup>10/</sup> the United States District Court for the District of Columbia addressed the constitutionality of the Cable Act's provisions relating to low power stations. Specifically, the court examined the sections of the Act which qualify low power stations for must-carry if the Commission determines, among other factors, that the station's programming would address local news and informational needs not being adequately served by full power television broadcast stations, as well as the market modification mechanism which may qualify an otherwise ineligible low power station for carriage, "depending in part on whether the requesting station provides coverage of news, sports or other items 'of interest to the community.'"<sup>11/</sup> The court upheld their constitutionality and held, in pertinent part, that these provisions do not constitute content-based legislation under the First Amendment, but are content-neutral instead. The court

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<sup>9/</sup> WRNN Comments at n.11.

<sup>10/</sup> 910 F. Supp. 734 (D.D.C. 1995).

<sup>11/</sup> Id. at 750, discussing 47 U.S.C. §§ 534(h)(2)(B), 534(h)(1)(C)(ii)(III).

reasoned that these provisions are viewpoint-neutral, because they were not shown to be motivated by a desire to promote or discourage broadcast of certain messages.<sup>12/</sup>

In its analysis, the court concluded that these provisions passed constitutional muster under an intermediate scrutiny analysis. In upholding these regulations, the court stated that the government's interest in ensuring the viability of over-the-air broadcasting was especially important because low power stations are "particularly economically sensitive to cable's increasing market power."<sup>13/</sup>

Similar justifications apply to WRNN's suggested change to the Commission's rules regarding local commercial television stations as well. WRNN's proposal does not ask the Commission to promote specific viewpoints, nor to discourage the broadcast of certain messages. WRNN's model broadly promotes categories of programming, not particular subjects. Under the reasoning of Turner, it too should qualify as content-neutral. Consequently, WRNN's proposal, which also seeks to advance the government's important interest in ensuring the viability of over-the-air broadcasting vis-a-vis smaller, independent stations, should also withstand an intermediate scrutiny analysis, if a constitutional challenge were brought.

In particular, the significant need to protect carriage rights of smaller, specialty stations such as WRNN which do not typically garner high ratings yet provide viewers with profound local service supports adoption of WRNN's proposal, to counter-balance cable's increasing market power, which threatens the continued viability of such stations. The same

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<sup>12/</sup> 910 F. Supp. at 750.

<sup>13/</sup> Id.

rationales requiring protection of low power television stations apply in the case of this type of station which can provide meaningful service to a greater number of households through market-wide carriage. Indeed, to suggest otherwise would lead to the illogical conclusion that the Commission should encourage provision of local news and informational needs of viewers in the case of low power television stations, but not for independent commercial television stations. Such a result would clearly not be consistent with Congress' goal of fostering localism.

### CONCLUSION

WRNN's comments made clear that by enacting the station's proposal, the Commission will deliver to broadcasters a definite incentive to provide public interest programming, while ensuring that the mandatory carriage provisions once again aid Congress' intended beneficiaries -- the viewers and small television stations -- rather than serving as a tool for cable operators' marketplace dominance at the expense of independent voices and public interest programming. The result of implementation of WRNN's modification will be an integral step in the Commission's path to forging a social compact with broadcasters to best serve the public. A review of the comments submitted in this proceeding has not altered, but only intensified, the need for the Commission to adopt




WRNN's proposed regulations regarding the definition of markets for purposes of cable television mandatory television broadcast signal carriage.

Respectfully submitted,

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